

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

ANDRE ROYAL,

Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE
MANAGEMENT COUNCIL *et al.*,

Defendants.

Case No. 19-cv-5164 (AJN)

**MEMORANDUM IN SUPPORT OF DEFENDANT
NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL'S
MOTION FOR ATTORNEY FEES**

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PRELIMINARY STATEMENT

Defendant NFL Management Council (the “NFLMC”) brings this attorney fee motion under ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1). Pursuant to Rule 54(d)(2) of the FRCP and Local Rule 54.1(c)(7), a fee award will mitigate the expense the NFLMC incurred defending against baseless claims made by Plaintiff Andre Royal, a former professional football player. Plaintiff’s complaint as against the NFLMC (as amended, the “Complaint”), which was a near carbon-copy of another former player’s complaint filed in this District in 2018 (the “*Hudson* Complaint”), was voluntarily dismissed on November 1, 2019. *Compare* Am. Compl., ECF No. 15, ¶¶ 2, 3, 6-9)¹ with *Hudson v. Nat’l Football League Mgmt. Council, et al.*, No. 18-cv-4483 (GHW) (RWL) (S.D.N.Y.). Plaintiff voluntarily dismissed his Complaint only after failing to oppose the NFLMC’s motion to dismiss—a motion to dismiss that made substantially the same legal arguments that the NFLMC set forth in its motion to dismiss the *Hudson* Complaint *nine months* before Plaintiff initiated this action.

The NFLMC incurred reasonable fees of \$56,152 in defending itself and moving to dismiss Plaintiff’s Complaint. The NFLMC is entitled to full compensation for these fees in light of Plaintiff’s acknowledgement—by his voluntary dismissal of this action—that his claims as against the NFLMC were without merit. In addition, the NFLMC requests compensation for all fees and costs incurred to bring this fee motion; the amount of such fees will be determined once this motion is fully briefed and heard.

¹ We attach a copy of the Amended Complaint as Exhibit A to the Declaration of Stacey R. Eisenstein (“Eisenstein Decl.”), which has been filed together with this memorandum of law.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

Plaintiff is a former professional football player currently receiving disability benefits under the Bert Bell/Pete Rozelle NFL Player Retirement Plan (the “Plan”), a benefit plan for retired National Football League (“NFL”) players negotiated between the NFLMC, the representative of the NFL clubs, and the NFL Players’ Association (“NFLPA”), the NFL players’ union. On June 1, 2019, Plaintiff initiated this action, by filing a complaint that is nearly an exact replica to the *Hudson* Complaint.² On August 26, 2019, Plaintiff filed his amended Complaint to amend certain of his allegations in light of a motion to dismiss filed by Defendants the Retirement Board of the Bert Bell/Pete Rozelle NFL Player Retirement Plan, Katherine “Katie” Blackburn, Richard “Dick” Cass, Ted Phillips, Samuel McCullum, Robert Smith and Jeffrey Van Note (the “Board Defendants”). Plaintiff did not amend his allegations as against the NFLMC, nor had Plaintiff at the time served the NFLMC with either of his complaints.

On August 31, 2018, nearly one-year before Plaintiff filed his Amended Complaint in this action, the NFLMC moved to dismiss the *Hudson* Complaint—a complaint Plaintiff appears to have copied—as the bulk of it is *exactly the same* (including typos). On September 5, 2019, Magistrate Judge Lehrburger recommended to the district court that the NFLMC’s motion to dismiss be granted. *Hudson* Report & Recommendation (“*Hudson* R&R”), No. 18-cv-4483, ECF No. 90.³ Plaintiff was on notice of the *Hudson* R&R given that the Board Defendants attached a copy of it as Exhibit A to their motion to dismiss the Amended Complaint filed on September 9, 2019 and specifically referenced the opinion throughout that motion. *See* ECF No. 16-2 (“Judge

² A copy of the *Hudson* Complaint is attached as Exhibit B to the Eisenstein Decl.

³ A copy of the *Hudson* R&R is attached as Exhibit C to the Eisenstein Decl.

Lehrburger’s comprehensive decision makes it clear that each of Royal’s copycat claims fail on multiple levels and should be dismissed as well.”⁴

On September 30, 2019, District Judge Woods agreed with Magistrate Judge Lehrburger that the claims leveled against the NFLMC “predicated on its purported fiduciary liability . . . are without merit and should be dismissed.” *Hudson* R&R at 36; *see Hudson Order Adopting Report & Recommendation* (“*Hudson Order*”) at 2, No. 18-cv-4483, ECF No. 96.⁵

On September 11, 2019, in the interim between the issuance of the *Hudson* R&R and the *Hudson Order*, the Court in this action ordered Plaintiff to submit proof of service of the Complaint on the NFLMC. *See* ECF 17. Plaintiff served the NFLMC with the Complaint on September 12, 2019. *See* ECF 18.

On October 3, 2019, the NFLMC moved to dismiss Plaintiff’s Complaint in this action on the same grounds as it asserted in moving to dismiss the *Hudson* complaint more than a year prior. *Compare* ECF 35 with No. 18-cv-4483, ECF No. 53.⁶ As with the complaint in *Hudson*, Plaintiff’s claims against the NFLMC failed as a matter of law because they were based on the faulty premise that the NFLMC is a “fiduciary” to the Plan, and, in any event, failed to demonstrate that the NFLMC breached any purported fiduciary duty.

Plaintiff failed to oppose the NFLMC’s motion to dismiss by his deadline of October 17, 2019. On October 25, 2019, in an order from this Court, the Court noted that it had not received opposition papers from Plaintiff in response to the NFLMC’s motion to dismiss, and this Court

⁴ A copy of the Board Defendants’ Memorandum of Law in Support of Their Motion to Dismiss is attached as Exhibit D to the Eisenstein Decl.

⁵ A copy of the *Hudson* Order is attached as Exhibit E to the Eisenstein Decl.

⁶ Copies of the NFLMC’s Memoranda of Law in Support of Its Motions to Dismiss the Complaint in this action and in *Hudson* are attached as Exhibits F and G to the Eisenstein Decl.

ordered that “[i]f Plaintiff wishes to oppose the motion, it must do so on or before November 1, 2019.” ECF No. 47.

On November 1, 2019, the Plaintiff filed a notice voluntarily dismissing this action against the NFLMC and the NFLPA, which was approved by this Court. ECF No. 50.⁷

LEGAL STANDARD

A. Statutory Basis for Attorneys’ Fees

Through his complaint, Plaintiff, as a beneficiary of the Plan, asserted three claims against the NFLMC under the Employee Retirement Income Security Act (“ERISA”). *See* Amended Complaint, Eisenstein Decl. Ex. A. By bringing this action under ERISA, Plaintiff provided this Court discretion to award the NFLMC its attorney fees. Section 502(g)(1) of ERISA provides that “[i]n any action under this [Title I of ERISA] (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney’s fee and costs of action *to either party*.” 29 U.S.C. § 1132(g)(1) (emphasis added).

B. Standard For ERISA § 502(g)(1) Fee Awards

In order to recover fees, the movant must first show that it achieved “some degree of success on the merits.” *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 255 (2010) (quoting *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 694 (1983)). A party meets this standard if “the court can fairly call the outcome of the litigation some success on the merits without conducting a ‘lengthy inquir[y] into the question [of] whether a particular party’s success was ‘substantial’ or occurred on a ‘central issue.’” *Hardt*, 560 U.S. at 255. “[A] fee claimant need not be a ‘prevailing party’ to be eligible for an attorney’s fees award under § 1132(g)(1).” *Id* at 252.

⁷ A copy of the Notice of Voluntary Dismissal is attached as Exhibit H to the Eisenstein Decl.

A party may demonstrate “some success on the merits” even without a court judgment or consent decree. Under the “catalyst theory” a party may succeed on an award for attorneys’ fees as long as it can show that its litigation activity “brought about a voluntary change in the [other party’s] conduct.” *Templin v. Indep. Blue Cross*, 785 F.3d 861, 865 (3d Cir. 2015); *see Scarangella v. Grp. Health, Inc.*, 731 F.3d 146, 154 (2d Cir. 2013) (applying the catalyst theory to find some success on the merits); *Carlson v. HSBC-N. Am. (US) Ret. Income Plan*, 542 F. App’x 2, 7 (2d Cir. 2013) (awarding attorney’s fees where “lawsuit prompted defendants to modify how the Plan credited pre-ERISA breaks in service—a change which provided [plaintiff] most of the benefits she sought”). Importantly, “§ 1132(g)(1) expressly grants district courts ‘discretion’ to award attorney’s fees ‘to *either* party.’” *Hardt*, 560 U.S. at 252 (emphasis in the original) (quoting 29 U.S.C. § 1132(g)(1)); *see also Locher v. Unum Life Ins. Co. of Am.*, 389 F.3d 288, 298 (2d Cir. 2004) (“ERISA’s attorney’s fee provisions must be liberally construed to protect the statutory purpose of vindicating retirement rights.”) (quoting *Chambless v. Masters, Mates & Pilots Pension Plan*, 815 F.2d 869, 871 (2nd. Cir. 1987)).

In addition, while the Supreme Court in *Hardt* held that courts need only look at whether there has been “some success on the merits,” the Supreme Court recognized that a court may apply—but is not required to apply—a five-factor test set forth in *Chambless*, 815 F.2d at 871 in “channeling [its] discretion when awarding fees.” *Hardt*, 560 U.S. at 255; *Donachie v. Liberty Life Assurance Co. of Bos.*, 745 F.3d 41, 46 (2nd Cir. 2014) (“Although a court *may*, without further inquiry, award attorneys’ fees to a plaintiff who has had ‘some degree of success on the merits,’ *Hardt* also made clear that courts retain discretion to ‘consider [] five [additional] factors . . . in deciding whether to award attorney’s fees.’”).

In *Chambless*, the Second Circuit set forth the following five factors (the “*Chambless* Factors”) for courts to consider when determining whether to award attorneys’ fees under ERISA § 502(g)(1):

- (1) the degree of the offending party’s culpability or bad faith;
- (2) the ability of the offending party to satisfy an award of attorney’s fees;
- (3) whether an award of fees would deter other persons from acting similarly under like circumstances;
- (4) the relative merits of the parties’ positions; and
- (5) whether the action conferred a common benefit on a group of pension plan participants.

815 F.2d at 871. It is not necessary for all *Chambless* Factors to militate towards an attorneys’ fee award for the court to grant such an award. *See Locher*, 389 F.3d 299 (concluding that failure to satisfy fifth *Chambless* Factor does not preclude award of fees); *Alexander v. Winthorp*, 497 F. Supp. 2d 429, 445 (E.D.N.Y. 2007) (“No one of the five factors is necessarily decisive, and some may not even be appropriate in a given case. . . .”) (internal citations omitted).

ARGUMENT

A. The NFLMC Achieved Success on the Merits.

The NFLMC achieved more than “some degree of success on the merits” in forcing Plaintiff to voluntarily dismiss his complaint following the district court in *Hudson* granting the NFLMC’s motion to dismiss a nearly identical complaint.

In the absence of a court order or consent decree, the Second Circuit determines whether a party had “some success on the merits” by applying the catalyst theory to determine if a party’s litigation activities pressured the other party to provide the requested relief. *Scarangella v. Group Health, Inc.*, 731 F.3d at 152. Under a catalyst theory, “a plaintiff prevail[s] for the purpose of fee-shifting provisions whenever her lawsuit . . . ‘brought about a voluntary change in the defendant’s conduct.’” *Perez v. Westchester Cty. Dep’t of Corr.*, 587 F.3d 143, 150 (2d Cir. 2009) (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S.

598, 605 (2001)); *see also Carlson*, 542 F. App'x at 7 (inferring “success on the merits” for plaintiff under the catalyst theory, even though plaintiff’s lawsuit was dismissed as moot, because it prompted the defendants to modify how they calculated ERISA benefits—“a change which provided [plaintiff] most of the benefits she sought.”); *Templin*, 785 F.3d at 867 (“Applying the catalyst theory, we find that the pressure of the lawsuit caused Appellees to change their position and provide Appellants with the interest they demanded.”).

In *Scarangella*, the court held that “success on the merits” could be inferred from the plaintiff’s voluntary dismissal of its ERISA claims “spurred by the summary judgment order that was skeptical of both of [plaintiff’s] remaining claims.” 731 F.3d at 155-56. A party likewise is entitled to attorney’s fees under ERISA where a court—although not necessarily the court deciding the fee application—provided an unfavorable analysis of a party’s claims and defenses. *See Hardt*, 560 U.S. at 256 (holding district court order opining positively on the merits of plaintiff’s claim, but remanding the matter to the claims administrator, where plaintiff received her desired relief, could constitute success on the merits in district court for purposes of awarding attorney’s fees under ERISA).

The catalyst theory is satisfied here. Indeed, the strength of the NFLMC’s motion to dismiss coupled with the *Hudson* court’s decision to grant the NFLMC’s motion to dismiss caused Plaintiff to change his position and voluntarily dismiss his claims.

B. The NFLMC Is Also Entitled to Attorneys’ Fees Under the Five-Factor Test

Although the Court is not required to review the five-factor test, courts “retain discretion to ‘consider [the] five [additional] factors . . . in deciding whether to award attorney’s fees.’” *Donachie*, 745 F.3d at 46 (quoting *Hardt*, 560 U.S. at 255 n.8); *see also Toussaint v. JJ Weiser*,

Inc., 648 F.3d 108, 110 (2d Cir. 2011) (“A court may apply—but is not required to apply—the [five] factors . . . under § 1132(g)(1).”). As set forth above, those five factors are:

- (1) the degree of opposing parties’ culpability or bad faith;
- (2) ability of opposing parties to satisfy an award of attorneys’ fees;
- (3) whether an award of attorneys’ fees against the opposing parties would deter other persons acting under similar circumstances;
- (4) whether the parties requesting attorneys’ fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and
- (5) the relative merits of the parties’ positions.

Hardt, 560 U.S. at 249 n.1. Of these factors, “the degree of culpability and the relative merits . . . ‘weigh heavily.’” *Slupinski v. First Unum Life Ins. Co.*, 554 F.3d 38, 48 (2d Cir. 2009) (quoting *Anita Founds., Inc. v. ILGWU Nat’l Ret. Fund*, 902 F.2d 185, 189 (2d Cir. 1990)). The majority of these factors weigh in favor of the NFLMC.⁸

First, Plaintiff is culpable. “[A] finding of culpability involves more than mere negligence, but does not require malice or an ulterior motive.” *Cohen v. Metro. Life Ins. Co.*, No. 00 Civ. 6112 (LTS)(FM), 2007 WL 4208979, at *2 (S.D.N.Y. Nov. 21, 2007) (internal citations omitted); see also *Donachie*, 745 F.3d at 47 (“‘[A] party need not prove that the offending party acted in bad faith’ in order to be entitled to attorneys’ fees.” (quoting *Slupinski*, 554 F.3d at 48)).

In commencing this action, Plaintiff merely copied the *Hudson* Complaint—apparently with little, if any, independent testing of the relative merits of that complaint as Plaintiff not only repeated meritless allegations, but also the *Hudson* Complaint’s typos. Plaintiff filed his original duplicative complaint ***nine months after*** the NFLMC filed its motion to dismiss in *Hudson*.

⁸ The NFLMC does not have information regarding Plaintiff’s finances to speak to the second factor (i.e., Plaintiff’s ability to pay).

Plaintiff was, thus, on notice of the strong arguments the NFLMC had against the allegations, and yet Plaintiff took no steps in the intervening nine months (nor in the time period leading up to filing his amended Complaint on August 26, 2019) to strengthen his claims by addressing any of the NFLMC's arguments in his complaint or revising his complaint to not include the NFLMC as a defendant.

On September 5, 2019, the *Hudson* R&R was issued in which Magistrate Judge Lehrburger found that the claims leveled against the NFLMC “predicated on its purported fiduciary liability . . . are without merit and should be dismissed.” Eisenstein Decl. Ex. C at 30. Yet, Plaintiff took no steps to voluntarily dismiss this action as against the NFLMC upon further learning of the weaknesses of his claims. Indeed, only after the *Hudson* R&R, did Plaintiff finally serve the NFLMC in this action. Nor did Plaintiff take immediate steps to dismiss this action following the issuance of the *Hudson* Order on September 30. Nor did Plaintiff immediately act after the NFLMC filed its motion to dismiss in this action on October 3. Rather, only after missing his deadline to oppose the NFLMC motion to dismiss and the Court *sua sponte* granting Plaintiff additional time to oppose, did Plaintiff inform the NFLMC of his intent to voluntarily dismiss this action. By failing to voluntarily dismiss this action sooner, Plaintiff caused the NFLMC to incur unnecessary fees and expenses—**75 percent** of the NFLMC's total fees were incurred after the *Hudson* R&R was issued, **34 percent** of the total fees were incurred after the *Hudson* Order.

Second, under the third factor, a fee award is warranted to deter similarly situated plaintiffs from engaging in future arbitrary actions. With apparently little thought, Plaintiff here copied (typos and all) another meritless complaint. Potential plaintiffs should be discouraged from filing actions in this Court without independently testing the relative strengths of such

actions. Potential plaintiffs should also be *encouraged* to consider the weaknesses of their potential claims and to voluntarily dismiss meritless claims in a timely fashion—such timely action and thoughtful consideration did not occur here.

Third, under the fifth factor, as discussed above, the relative merits of Plaintiff’s position supports an award given that the Plaintiff’s position was frivolous. Plaintiff should have been aware his claims against the NFLMC were meritless given that *prior to Plaintiff serving the NFLMC in this action*, Magistrate Judge Lehrburger found that the claims leveled against the NFLMC were “predicated on its purported fiduciary liability . . . are without merit and should be dismissed.” Eisenstein Decl. Ex. C at 30. Plaintiff was well aware of Magistrate Judge Lehrburger’s report and recommendation given that the Board Defendants attached a copy of it as Exhibit A to their motion to dismiss the Amended Complaint filed on September 9, 2019—three days prior to Plaintiff serving the NFLMC with the Complaint.

C. The Fees Requested Are Reasonable

The fees for which the NFLMC seeks reimbursement were all charged by its long-time counsel, Akin Gump Strauss Hauer & Feld, LLP (“Akin Gump”). Akin Gump is a global, full-service law firm, with an attorney practice groups specializing in both ERISA and litigation. Attorneys from Akin Gump’s New York and Washington, D.C. offices performed services in connection with defending this action, and Akin Gump charged its standard rates to the NFLMC for the work performed. Akin Gump understands that its standard rates are consistent with the rates charged by other comparably situated New York and Washington, D.C. – based law firms. Akin Gump took steps to minimize its fees by working efficiently, staffing the matter leanly, and

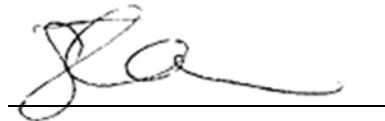
leveraging prior work it performed in connection with the *Hudson* action.⁹ Accordingly, the fees requested and the rates at which these fees accrued are reasonable.¹⁰

CONCLUSION

For the reasons stated above, the NFLMC respectfully requests that this Court award it \$56,152 in fees and any fees it incurs seeking the relief in this motion.

Dated: November 14, 2019

Respectfully submitted,



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⁹ While the NFLMC incurred fees of \$62,016.30 to defend this action, the NFLMC has reviewed the invoices in good faith and reduced the total fees it is requesting be reimbursed by \$5,864.30.

¹⁰ Akin Gump's invoices (redacted to remove privileged content) are attached as Exhibits I, J, K & L to the Eisenstein Decl.